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THIS CASE IS SCHEDULED FOR CONSIDERATION ON
JANUARY 5, 1990

No. 89-700

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC. *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

**MOTION OF SHURBERG BROADCASTING OF HARTFORD
FOR LEAVE TO WITHDRAW BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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January 2, 1990

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**MOTION FOR LEAVE TO WITHDRAW
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Respondent Shurberg Broadcasting of Hartford ("Shurberg") hereby moves for leave to withdraw its Brief in Opposition to the Petition for Writ of Certiorari submitted in the above-captioned case by Astroline Communications Company Limited Partnership ("Astroline" or "Petitioner"). Shurberg's Brief was filed with the Court on December 5, 1989.

The instant request to withdraw Shurberg's Brief should not be interpreted as indicating that Shurberg supports *any* of the arguments (individually or collectively) advanced by Astroline in its Petition. To the contrary, Shurberg remains convinced that the Court below correctly concluded that the "minority distress sale policy" of Respondent Federal Communications Commission ("FCC") is unconstitutional, consistent with principles recently articulated by this Court.

What concerns Shurberg is the persistent refusal of the FCC thus far to acknowledge and accept the substantive correctness of the decision below or to recognize the limits which the Constitution imposes on the FCC's activities. In light of that refusal, it appears to Shurberg that consideration by this Court of the merits of this case may be the only way that the issues of this case will finally, conclusively, be resolved and Shurberg will be assured of proper treatment before the FCC.¹

The Court below correctly declared the "minority distress sale policy" to be unconstitutional as applied by

¹ Shurberg emphasizes that its position has not changed with respect to the correctness of the determination below of the unconstitutionality of the "minority distress sale policy". Thus, if a writ of certiorari were to be granted, Shurberg would participate before the Court as a party-respondent in opposition to reversal of the decision below.

the FCC in its December, 1984 action involving Shurberg. The FCC had permitted Astroline to invoke the "minority distress sale policy", thus allowing Astroline to acquire the license of Station WHCT-TV, Hartford, Connecticut. In so doing, the FCC rejected Shurberg's claim for the right to compete for the facilities of that station. Concluding that the FCC's "minority distress sale policy" amounted to unconstitutional reverse discrimination, the majority of the Court below remanded the case to the FCC.

The decision of the Court below was issued on March 31, 1989. The FCC sought rehearing and rehearing *en banc*, both of which were denied by orders issued June 16, 1989. The FCC elected not to seek further review of the decision below, and in fact has opposed Astroline's petition for certiorari. The FCC has not sought a stay of mandate from the Court below.

Nevertheless, the FCC has yet to take any steps toward withdrawing the contested license from Astroline. As a result, the results of the unconstitutional agency action remain in place more than nine months after that action was first determined to be unconstitutional, and more than five years after the unconstitutional agency action was taken. More importantly, the FCC -- despite its election not to seek review by this Court of the decision below -- has *still* not acknowledged the correctness of that decision and has *still* not clearly and unequivocally announced that it is ready, willing and able to comply with that decision. Indeed, in its Brief in

Opposition to Astroline's Petition to this Court, the FCC assiduously avoids *any* direct statement concerning the substantive correctness of the decision below. To the contrary, the FCC appears to express sympathy for Astroline's "precarious" situation, FCC Brief at 19-20, and appears to leave open the possibility that future legislation could result in the reimposition of race-based policies such as the "minority distress sale policy", thereby affecting the resolution of this case, FCC Brief at 22.

The FCC's concern about Astroline's bankruptcy is curious. At the inception of this case before the Court below, Shurberg moved for a stay of the FCC's action in order to maintain the status quo ante. The FCC opposed Shurberg's motion, stating, *inter alia*, that

parties who act in reliance on agency decisions before they have become final and beyond . . . review by the courts do so at the risk that they may have to reverse that action. . . If the Commission's orders were to be reversed on appeal, whatever action was taken in reliance on the orders could and would be undone. If [Shurberg] should prevail on review, Astroline will be required to return the license to Faith Center.

FCC Opposition to Shurberg Emergency Motion for Stay at 4-5.²

In view of the FCC's representation to the Court below, the pendency of Astroline's bankruptcy should have no effect on this Court's disposition of Astroline's petition for certiorari. If that petition is denied (or if the decision below is ultimately affirmed by this Court), it is clear that the license at issue must be returned to its former owner, and Astroline will have no interest whatsoever in that license, regardless of its fate in the bankruptcy proceeding.³ In that event, then, the

² For its part, in its opposition to Shurberg's motion for stay, Astroline acknowledged and expressly accepted any such risk with the following language:

Astroline . . . incurs the entire risk of proceeding with the purchase and operation of [the station]. . . . Astroline is willing to undertake the potential risk that it might suffer some economic loss should it not prevail on the appeal.

Astroline Memorandum in Opposition to Shurberg Emergency Motion for Stay at 14-15.

³ As a practical matter, the license should *already* have been withdrawn from Astroline: neither the FCC nor Astroline has sought a stay of the effectiveness of the decision of the Court below. Nevertheless, the FCC has refused to honor its
(continued...)

bankruptcy would be irrelevant to the issue now before this Court. And if this Court should grant Astroline's petition and reverse the Court below, then Astroline would theoretically be allowed to retain the license and to take all lawful actions it might choose in connection therewith. To the best of Shurberg's knowledge, Astroline has not indicated that it would seek to assign the station in that event, and any argument by the FCC based on the possibility of such an assignment is, at best, wholly unsupported speculation.

Shurberg is concerned that the FCC's failure unequivocally to commit to correcting the agency's unconstitutional action below, together with the FCC's apparent equivocation relative to the correctness of that decision, means that, notwithstanding that decision, Shurberg will continue to have to struggle to secure proper, Constitutional, treatment before the FCC.⁴

³(...continued)

commitment to the Court below that "[i]f [Shurberg] should prevail on review, Astroline will be required to return the license to Faith Center". FCC Opposition to Shurberg Emergency Motion for Stay at 4-5.

⁴ As an example of the FCC's apparent position in this regard, at Footnote 17 of its Brief in Opposition to Astroline's Petition, the FCC suggests that the decision below requires the FCC to "consider the interests" of Astroline in the license of
(continued...)

Shurberg is a non-minority entity which has, for more than five years, litigated against a race-based policy which the FCC itself has expressly acknowledged lacks any supporting record as required by the Constitution. Despite the FCC's obvious enchantment with Astroline (if not with its own "minority distress sale policy"), and despite (or perhaps because of) the FCC's own refusal

⁴(...continued)

Channel 18. But Astroline has no such interests: it acquired the license of that station pursuant to a policy which has been determined to have been unconstitutional; the FCC itself committed to withdrawing the license from Astroline if Shurberg should prevail in its appeal. And, while Astroline has certainly incurred a number of debts in connection with the station, Astroline itself assumed the risk of any such debts. Astroline's "interest" in the station is, therefore, immaterial here.

Shurberg's fear that the FCC will attempt simply to disregard the immateriality of Astroline's financial position is not unwarranted. The FCC has previously announced to the Court below that, even if the FCC were to determine that the "minority distress sale policy" lacked Constitutional support, the FCC intended nevertheless to permit Astroline to retain the station. FCC Report in Response to Remand. In other words, left to its own devices, the FCC apparently intends to leave in place the unconstitutional results of an unconstitutional policy, irrespective of Shurberg's contrary interests.

to announce and adhere to a single position with respect to that policy, Shurberg prevailed below. And despite that, it appears from the FCC's Brief to this Court that the FCC is *still* inclined to ignore the Constitution, the decisions of this Court, and the FCC's own representations to the Court below, in an effort to continue to leave in place the unconstitutional results of an unconstitutional policy.

Apparently, the FCC may still be unwilling to accept the essentially *color-blind* nature of the Constitution. If review of this case by this Court is necessary to provide to the FCC a clear, unequivocal, final statement concerning the unconstitutionality of the "minority distress sale policy" -- and, thus, to avert the need for any further struggle by Shurberg or any other non-minority victim of improper and unconstitutional governmental policies -- then Shurberg will not seek to oppose such review.

For the foregoing reasons, Shurberg Broadcasting of Hartford moves for leave to withdraw its Brief in Opposition to the Petition for Writ of Certiorari.

Respectfully submitted,

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